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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JUAN RAMON PEREZ, JR., Defendant and Appellant.	G025447 (Super. Ct. No. 97CF3905) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed.

Janyce Keiko Imata Blair, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, William W. Wood and Sara Gros-Cloren, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Juan Ramon Perez, Jr., of first degree murder and participation in a criminal street gang and found personal use of a firearm and criminal street gang allegations true. Perez complains of the admission for impeachment purposes of statements taken in violation of *Miranda* and argues the prosecution's gang expert was

allowed to give opinion testimony on the defendant's subjective intent to aid and abet a violent confrontation. Neither contention has merit and we affirm.

I

American Express has it wrong — membership does not always have its rewards. On October 18, 1995, Juan Ramon Perez and other Highland Street gang members were at the Bristol Swap Mall in Santa Ana. Over time, the Highland Street crew had forged an alliance with Los Compadres, a faction whose territory included the mall and its environs. Both gangs frequented the mall and were recognized as "regulars" by security guard Kelly Vithearoth.

Seven of these "regulars," including Perez, were at the mall around 7:00 p.m. (Vithearoth did not know Perez by name, but recalled seeing him at various times over the past two years. Perez wore a black baseball hat bearing the initials "C.H.R.," an acronym for the Highland Street gang.) Suspecting trouble, Vithearoth ordered them to leave the mall. They broke into two groups but quickly rejoined forces.

Francisco Nava, Vincente Carrillo, Rodolfo Carrillo, and Ruben Ramirez, all members of the rival West Myrtle gang, arrived at the mall around this time. Richard Sandoval and two of his Highland Street Cronies issued the traditional challenge, asking the West Myrtle group where they were from. Carrillo chose the worst possible answer, acknowledging they were from West Myrtle. Sandoval asked if they were mad about being "hit up" by their rivals. Nava's group shook their heads in a collective "no" and went inside the mall.

The West Myrtle group stayed at the mall for 10 minutes and decided to leave. The Highland Street group reappeared, complete with reinforcements. Ramirez heard one of them announce, "Here they come, here they come." Perez and his Highland Street cohorts approached their West Myrtle rivals. Another challenge issued, with the Highland Street gang stating "this is West Compadres." Outnumbered, the West Myrtle

members tried to ignore Perez and his companions, but it was too late. Soon, the two groups were arguing and calling each other names.

Stationed near the front of the mall, Vithearoth saw the confrontation and urged the Highland Street contingent to leave. Nava and his friends walked toward the parking lot, with the Highland Street gang close behind. Suddenly, Perez yelled "Come here, fucking turtles," and pulled out a gun. The West Myrtle members started to run, but Ramirez heard someone say "shoot them, shoot them," and several shots were fired.

Vithearoth heard the shots and saw Perez brandishing a pistol. Perez fired two more shots. Vithearoth chased him and had a clear view of Perez's face. He saw him fire the gun. One of the shots hit Nava in the back of the neck and proved fatal.

Vithearoth reviewed a photo lineup at the police station a short time after the shooting occurred. Shown four books of photographs with pictures of both the Compadres and Highland street gangs, Vithearoth picked out two different photographs, one in the Highland book and one in the Compadres book. Both photographs were of Perez. Hiding in his bathtub behind a shower curtain, Perez managed to evade the authorities during a search of his home and fled to Las Vegas. Police located him there on September 30, 1997, nearly two years after the murder. Detective Terry Zlateff of the Santa Ana Police Department's gang homicide unit was dispatched to bring him back to Orange County.

At trial, Vithearoth positively identified Perez as the shooter again. Carrillo and Ramirez were unable to identify the shooter, but Ramirez stated the gunman wore a hat marked with the letters "C.H.R." The prosecution's gang expert, Detective Matthew Craig, testified Los Compadres, Highland Street and West Myrtle Street were all street gangs involved in widespread criminal activities, including murder. Craig identified Perez as a member of the Highland Street gang, noting he had received a criminal street gang notice in September 1994. Given a hypothetical based on the facts of the case, Craig opined the crime was committed for the benefit of a criminal street gang.

Various witnesses testified for the defense at trial, including some of Perez's fellow gang members. They all claimed Perez was at the scene but was not the shooter. Perez took the stand, admitting membership in the Highland Street gang and his presence at the shooting. He claimed he was talking with some girls when the shots were fired and did not recognize the shooter. He panicked and fled to Mexico before making his way to Las Vegas. Two years later, he was arrested in Las Vegas for driving with expired registration tags. He said he gave a false name because he knew the police were looking for him.

II

At trial, Perez testified he did not remember telling Detective Zlateff he had been arrested — on three different occasions, no less — for auto theft, possession of stolen property, and use of a false name, all during his stay in Las Vegas. For impeachment purposes, the prosecution was allowed to call Zlateff, who testified Perez had mentioned arrests in Las Vegas for these crimes.

Perez challenges the admission of Zlateff's testimony, claiming these statements were obtained in violation of *Miranda*, following 10 different attempts to invoke the right to remain silent. We see things differently and affirm.

Preliminarily, we note Perez's failure to raise this claim at trial. Before cross-examination, the prosecutor announced her intention to impeach defendant with the statements he made to the police. Defense counsel offered a continuing objection to the admission of Zlateff's testimony on Evidence Code sections 1101, subdivision (a), and 352 grounds. But the trial court overruled that objection, finding the evidence was offered for purposes of impeachment and not under section 1101. Questions about the Las Vegas crimes prompted a series of "I wouldn't know" or "I wouldn't remember" answers.

Following this exchange, defense counsel tried a new tack, claiming the interrogation violated *Miranda* and these statements could not be used for impeachment purposes because he did not "open the door" and raise the topic on direct. But a defendant cannot complain on appeal that evidence was inadmissible on a certain ground if he did not

make a *timely* and *specific* objection on that ground below. (Evid. Code, § 353; *People v. Mayfield* (1993) 5 Cal.4th 142, 172; *People v. Clark* (1993) 5 Cal.4th 950, 988.) Any claim of error has been waived on appeal.

Turning, for the sake of argument, to the merits, we note that post-Proposition 8 evidence law (Cal. Const., art. I, § 28, subd. (d)) does not provide for the exclusion of evidence as a remedy for constitutional violations, "'except to the extent the exclusion remains federally compelled.'" (*People v. May* (1988) 44 Cal.3d 309, 316, (*May*) quoting *In re Lance W.* (1985) 37 Cal.3d 873, 886-887.) *May* held that, in the wake of Proposition 8, statements obtained from a defendant in violation of *Miranda* are admissible for impeachment purposes — a rubric directly contrary to the rule articulated in *People v. Disbrow* (1976) 16 Cal.3d 101. The Supreme Court found "section 28(d) abrogated the *Disbrow* rule and thereby left *Harris v. New York* (1971) 401 U.S. 222 [allowing statements in violation of *Miranda* to be introduced for impeachment] to govern the case . . . ." (*May, supra*, 44 Cal.3d at p. 314.)

People v. Peevy (1998) 17 Cal.4th 1184 took the analysis one step further: "Our review of the relevant high court authority indicates that . . . the *Harris* rule applies even if the individual police officer violates *Miranda* and *Edwards* by purposefully failing to honor a suspect's invocation of his or her right to counsel." (*Id.* at p. 1196.) That is the rule applicable here.

Thus, even if the issue were properly preserved on appeal, Ramirez could not demonstrate any grounds for reversal. Perez acknowledged an arrest in Las Vegas for driving without a license and with expired registration tags. When the prosecutor asked if there were any other arrests, Perez claimed he could not remember. Shown a copy of the police report listing the additional crimes, Perez indicated his recollection had been refreshed on the issue. But he continued to respond, over continuing defense objections, that he "wouldn't remember" or "wouldn't know" if he had told an officer about these crimes. The trial court allowed the prosecutor to call Zlateff in rebuttal, *after* Perez

continued to assert his inability to recall his earlier statements. Zlateff confirmed the defendant had told him about three separate arrests in Las Vegas. This was proper impeachment under *Harris* and *Peevy*. There was no error and there are no grounds for reversal.[1]

III

Perez next complains the prosecution's gang expert was improperly allowed to express his opinion on his subjective intent to aid and abet a violent confrontation. (See Pen. Code, § 29.) An expert's opinion as to subjective mental state, we are told, is insufficient alone to support a conviction. We agree, but the record reveals there was no objection to this testimony on this ground. Perez did object, but only on relevancy grounds. That objection was overruled and no other objections were forthcoming. It bears repeating: A defendant cannot complain on appeal that evidence was inadmissible on a certain ground if he did not make a timely and specific objection on that ground below. (Evid. Code, § 353; see *People v. Clark* (1992) 3 Cal.4th 41, 122; *People v. Bury* (1996) 41 Cal.App.4th 1194.) Accordingly, we find any claim of error was waived on appeal.

In any event, we are persuaded Craig did not offer an opinion — expert or otherwise — on Perez's state of mind. Based on his knowledge of gang culture and his experience with this particular cast of characters, Craig concluded this shooting was committed for the benefit of a criminal street gang. As we noted at the outset, Craig explained how gang members "back up" their comrades, i.e., "a concept where a gang member will expect his fellow gang members to provide support for him in the case of an

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[1] Finally, even if we were to assume the trial court bungled the evidentiary call, Perez cannot demonstrate prejudice requiring reversal. Unlike the charges at issue here, the evidence related to three nonviolent offenses. Perez's credibility was already in serious question, given his admission that he had used false names and had been arrested for driving without a license or valid registration tags. Earlier, he admitted doing time in a juvenile facility for two crimes involving moral turpitude, and conceded his gang membership and a working knowledge of firearms. Perez also recounted his efforts to evade the police and escape to Las Vegas after the murder. All in all, the challenged evidence was no more damaging than the statements Perez made on the stand. Put another way, there was ample evidence — apart from the challenged testimony — to support the convictions. Any error on this point could only have been harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 295; *People v. Sims* (1993) 5 Cal.4th 405, 447.)

altercation." Craig testified that gang members can support their friends and intimidate their rivals by a show of superiority in numbers, even though they are not "physically involved" in the confrontation. In other words, the expert's testimony "focused on what gangs and gang members typically expect and not on [defendants'] subjective expectation in this instance." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371; cf. *United States v. Garcia* (9th Cir. 1998) 151 F.3d 1243, 1245-1246.)

Perez complains that the gang expert's explanation of gang "backup"[2] as including mere presence contradicted CALJIC No. 3.01[3] and constituted an erroneous statement of the law. In fact, it constituted no statement of law. It was an explanation of how gangs worked. Trial counsel probably reasoned — almost certainly correctly — that there was no chance the jury would misunderstand this so there was no reason to address it in argument. That is our conclusion as well.

Furthermore, here there was ample evidence that Perez was the shooter, not an aider and abettor. Perez was charged with the crimes of murder and personal use of a firearm in the commission of the offense, not theories of derivative liability. In short, this was not an aider and abettor case. Perez claims the panel returned a conviction based on his status as a gang member and his presence at the confrontation. We are convinced they did not. Security guard Vithearoth, an eyewitness to the crime, positively identified defendant as the shooter. The jurors simply rejected Perez's claim that he was a mere bystander and found he fired the shots which killed Nava. That is a pure credibility call. It is not our function to reweigh the evidence, and there are no grounds for reversal.

The judgment is affirmed.

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2 During direct, the prosecutor asked Craig "does a gang member have to be physically involved in a confrontation to be a backup?" Craig responded "No." Asked "Can they [i.e., other gang members] just stand by and support?" Craig answered affirmatively and went on to state that "Even though they haven't actually engaged in the confrontation, their mere presence in the sight of [a rival gang] is going to show support."

3 CALJIC No. 3.01 provides in pertinent part, as follows: "Mere presence at the scene of a crime which does not itself assist the commission of a crime does not amount to aiding and abetting."

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.